UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- against –	:	
MARK NORDLICHT, DAVID LEVY, DANIEL SMALL, JOSEPH MANN, JOSEPH SANFILIPPO, and JEFFREY SHULSE,	:	**ORDER**
	:	16-cr-00640 (BMC)
Defendants.	:	

COGAN, District Judge.

Defendant Levy's [670] motion to strike is denied for the reasons set forth below.

1. Levy seeks to strike Government Exhibit 4212, a 2007 PowerPoint presentation about a Platinum fund, for three reasons. First, Levy claims that the controlling fund documents render this presentation irrelevant. This argument is foreclosed by United States v. Weaver, 860 F.3d 90, 95 (2d Cir. 2017) ("contractual disclaimers of reliance on prior misrepresentations do not render those misrepresentations immaterial").

2. Levy misconstrues the Court's April 28, 2019 order, which he claims "unambiguously stated that Dr. Huth was not permitted to rely on any statements contained in the 2007 summary provided to him by his boss." To the contrary, this order denied defendants' motion to strike Huth's testimony about his redemption rights, which was based in part on Huth's review of Government Exhibit 4212. Although the order granted Levy's motion to strike Huth's testimony that his investment would be immunized from a restructuring of the fund if he

did not vote in favor of the restructuring, this testimony was based on an idiosyncratic reading of a November 23, 2015 email, not the 2007 presentation.

3. Second, Levy claims that this presentation is outside the statute of limitations period. However, to prove a conspiracy charge, the Government has to show "that the conspiracy still subsisted within the [relevant time period], and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period." Grunewald v. United States, 353 U.S. 391, 970 (1957). Because "inherent in that rule is the government's ability to plead and prove earlier overt acts," the 2007 presentation "is admissible to prove an overt act in furtherance of the charged conspiracy . . . ." United States v. Saneaux, 365 F. Supp. 2d 493, 505 (S.D.N.Y. 2005).

4. Third, Levy claims that the 2007 presentation was outside the commencement date of the charged conspiracies, the earliest of which allegedly began in 2012. However, this presentation is "admissible because . . . it 'arose out of the same transaction or series of transactions as the charged offense, . . . is inextricably intertwined with the evidence regarding the charged offense, or . . . is necessary to complete the story of the crime on trial.'" United States v. Reed, 576 F. App'x 60, 61 (2d Cir. 2014) (quoting United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000)). Huth testified that he decided to invest in Platinum, in part, because of the 2007 presentation, and he continued to be a Platinum investor through the time period of the alleged conspiracy.

5. Levy also notes that any purported misrepresentations in the 2007 presentation cannot be the basis for a conviction here, and the Court agrees to the extent he means that any misstatements in the presentation cannot be the sole basis for a conviction. In that instance, the Government would have failed to meet its burden of proving beyond a reasonable doubt the

existence of an overt act taken in furtherance of the conspiracy within the statute of limitations. However, the Court can address Levy's concern with appropriate jury instructions, not by precluding Government Exhibit 4212.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
May 3, 2019